# Public Prosecutor v Syed Ahmad Shariff bin Syed Abdul Rahman

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–70 OF 2009
ABDUL MALIK ISHAK, AZHAR MA'AH AND APANDI ALI JJCA
18 SEPTEMBER 2012

*Evidence — Identification evidence — Turnbull guidelines — Whether evidence of police witness identifying accused consistent with Turnbull principles — Whether identification corroborated by other evidence — Whether manner drugs were hidden in van showed accused's knowledge of them — Whether defence's story a bare denial and afterthought and failed to raise reasonable doubt on prosecution case*

The respondent ('accused') was charged in the High Court jointly with another person ('Sabri') with trafficking in 113,616g cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952. Sabri was acquitted and discharged at the end of the prosecution's case while the accused was acquitted and discharged after full trial. The instant appeal by the prosecution was only against the accused's acquittal. According to the prosecution's evidence, a police party acting on information received followed a van from near an R&R area at Hulu Bernam along the North-South Highway until it reached a house in Gombak, Kuala Lumpur. Along the way, the van stopped briefly at a toll plaza where the two occupants of the van — later identified to be the accused and Sabri — had got out from the vehicle to switch places as driver/passenger. Once the van reached the Gombak house and the two occupants of the van had entered the house, the police party stormed the premises and arrested the accused, Sabri and two others, Irwan and Mawardi, who were there at the time. After searching the house, the police party took the arrested persons and the van to a police station where the van was thoroughly searched. The 113,616g of cannabis was found in packets concealed within specially constructed compartments inside what looked like an air-conditioning duct in the ceiling of the van. The van was registered in the accused's name. The accused's defence was that Irwan and Mawardi were his housemates and they had borrowed the van for a week to collect and sell used clothes. The accused claimed he was in the house with Sabri on the morning in question when Irwan and Marwardi returned to the house in the van and that shortly thereafter the police broke into the house and arrested all of them. The whole episode, from the time the police party had followed the van till the time the arrests were made, took place between 3am and 5am. The High Court acquitted and discharged the accused solely on the ground there was reasonable doubt as to his identification ie whether he was the person clad in a black T-shirt who, according to the testimony of one of the members of the police party, SP6, was driving the van at the material time. In

A the appeal, the prosecution, inter alia, submitted that the trial judge, after calling for the defence, had no basis to change her findings on the identification of the accused at the end of the trial. The prosecution also said the trial judge erred in failing to find the defence's story was an afterthought.

B **Held**, allowing the appeal, setting aside the decision of the High Court, convicting the accused on the charge and sentencing him to death:

(1) The identification of the accused by SP6 was consistent with the Turnbull principles. The quality of SP6's identification could be seen in his
C evidence. The identification features were also mentioned by SP6 in his contemporaneous police report. Besides SP6, the investigating officer, SP7, had also identified the respondent (see paras 16–18).

(2) Since the van did not come with a factory-fitted air-conditioner on the ceiling and it was clear the so-called air-conditioning duct was just a
D dummy to conceal the special compartments therein, it was reasonable to infer the accused knew of the special compartments as the van was registered in his name since 1997. The method and the way the cannabis was concealed was corroborative evidence of knowledge on the accused's part (see paras 21–22).

E

(3) The defence's story was a bare denial and an afterthought and failed to raise a reasonable doubt on the prosecution's case. During cross-examination the accused agreed the police did not find any used clothing in the van. This fact negated the story that the van was used by
F Irwan and Mawardi to sell used clothes. It was also never suggested to SP6 and SP7 during their cross-examination that the van was driven by either Irwan or Mawardi. It was trite law that if the defence's story was not put at the earliest possible stage, such defence shall be deemed to be an afterthought and such non-disclosure would have a negative effect on the
G credibility of the defence's story (see paras 24–26).

**[Bahasa Malaysia summary**

Responden ('tertuduh') telah dituduh di Mahkamah Tinggi secara bersama dengan seorang lagi ('Sabri') untuk mengedar 113,616g kanabis di bawah
H s 39B(1)(a) Akta Dadah Berbahaya 1952. Sabri dibebaskan pada akhir kes pihak pendakwaan sementara tertuduh telah dibebaskan selepas perbicaraan penuh. Rayuan ini adalah oleh pihak pendakwaan hanya terhadap pembebasan tertuduh. Menurut keterangan pihak pendakwaan, pasukan polis bertindak berdasarkan maklumat yang diterima telah mengekori sebuah van dari
I kawasan R&R di Hulu Bernam sepanjang Lebuhraya Utara-Selatan sehingga ia tiba di sebuah rumah di Gombak, Kuala Lumpur. Sepanjang perjalanan, van berhenti seketika di plaza tol di mana dua penumpang van — kemudian dikenali sebagai tertuduh dan Sabri — keluar daripada kenderaan untuk bertukar tempat sebagai pemandu/penumpang. Setelah van tiba di rumah

Gombak dan kedua-dua penumpang van telah memasuki rumah, sepasukan polis meluru ke dalam premis dan menangkap tertuduh, Sabri dan dua yang lain, Irwan dan Mawardi, yang pada masa itu berada di situ. Setelah memeriksa rumah tersebut, sepasukan polis telah membawa orang yang ditangkap dan van ke balai polis di mana van tersebut telah diperiksa dengan teliti. 113,616g kanabis telah dijumpai di dalam paket-paket yang telah disembunyi di dalam petak khas yang dibina di dalam salur hawa dingin di dalam bumbung van. Van tersebut didaftarkan atas nama tertuduh. Pembelaan tertuduh adalah bahawa Irwan dan Mawardi merupakan teman serumahnya dan mereka telah meminjam van tersebut untuk seminggu untuk mengambil dan menjual pakaian terpakai. Tertuduh mendakwa dia berada di dalam rumah bersama Sabri pagi tersebut apabila Irwan dan Mawardi pulang ke rumah dengan van dan bahawa sejurus selepas itu polis memecah masuk rumah dan menangkap mereka semua. Kesemua episod, dari masa sepasukan polis telah mengekori van sehingga masa penangkapan dibuat, berlaku di antara 3 pagi dan 4 pagi. Mahkamah Tinggi membebaskan tertuduh hanya atas dasar terdapat keraguan munasabah mengenai identitinya iaitu sama ada dia merupakan orang yang memakai kemeja berwarna hitam yang, menurut testimoni salah seorang ahli daripada pasukan polis, SP6, memandu van pada masa matan tersebut. Di dalam rayuan, pihak pendakwaan, antara lain, berhujah bahawa hakim bicara, setelah memanggil untuk pembelaan, tidak mempunyai sebarang asas untuk menukar keputusannya mengenai identiti tertuduh pada akhir perbicaraan, Pihak pendakwaan juga menyatakan hakim bicara telah terkhilaf kerana gagal untuk mendapati kisah pembelaan hanyalah sesuatu yang difikirkan kemudian.

**Diputuskan**, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, mensabitkan tertuduh dengan tuduhan dan menjatuhkan hukuman mati:

(1) Pengenalpastian identiti tertuduh oleh SP6 adalah konsisten dengan prinsip Turnbull. Kualiti pengenalpastian SP6 boleh dilihat daripada keterangan. Sifat-sifat pengenalpastian juga dinyatakan oleh SP6 dalam laporan polis semasanya. Selain SP6, pegawai siasatan, SP7, juga mengenalpasti responden (lihat perenggan 16–18).

(2) Memandangkan van tersebut tidak didatangkan bersama dengan penghawa dingin yang dibuat oleh kilang pada bumbungnya dan adalah jelas saluran penghawa dingin tersebut hanya sesuatu untuk menyembunyikan petak khas, adalah berpatutan untuk membuat kesimpulan bahawa tertuduh tahu tentang petak khas tersebut memandangkan van tersebut didaftarkan atas namanya sejak 1997. Kaedah dan cara kanabis disembunyikan adalah keterangan menyokong tentang pengetahuan pada pihak tertuduh (lihat perenggan 21–22).

(3) Kisah pembelaan adalah penafian semata-mata dan sesuatu yang

A difikirkan kemudian dan gagal untuk menimbulkan keraguan munasabah pada kes pihak pendakwaan. Semasa pemeriksaan balas tertuduh bersetuju polis tidak menjumpai sebarang pakaian terpakai di dalam van. Fakta ini menafikan kisah bahawa van telah digunakan oleh Irwan dan Mawardi untuk menjual pakaian terpakai. Tidak pernah dicadangkan kepada SP6 dan SP7 semasa pemeriksaan balas mereka bahawa van telah dipandu oleh sama ada Irwan atau Mawardi. Adalah undang-undang tetap bahawa sekiranya kisah pembelaan tidak dikemukakan pada peringkat paling awal, pembelaan tersebut akan dianggap sebagai sesuatu yang difikirkan kemudian dan ketiadaan pendedahan akan membawa kesan negatif pada kebolehpercayaan kisah pembelaan (lihat perenggan 24–26).]

**Notes**

For cases on Turbull guidelines, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2120–2123.

**Cases referred to**

*Chua Beow Huat v PP* [1970] 2 MLJ 29 (refd)
*Hamidon bin Mat Yatim v PP* [1995] MLJU 112; [1995] 3 CLJ 735, HC (refd)
*Megat Halim bin Megat Omar v PP* [2008] MLJU 647; [2009] 1 CLJ 54, CA (refd)
*Miller v Minister of Pensions* [1947] 2 All ER 372, KBD (refd)
*PP v Lin Lian Chen* [1992] 2 MLJ 561, SC (refd)
*PP v Saimin & Ors* [1971] 2 MLJ 16 (refd)
*Raymond Tumbull & Ors* (1976) 63 Cr App R 132, CA (refd)
*Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
*Teh Hock Leong v PP* [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
*Teng Howe Sing v PP* [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
*Wjchai Onprom v PP* [2006] 5 MLJ 415, CA (refd)
*Wong Swee Chin v PP* [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)

**Legislation referred to**

Criminal Procedure Code ss 182A, 277
Dangerous Drugs Act 1952 s 39B(1)(a)

**Appeal from**: Criminal Trial No 45–1 of 2005 (High Court, Shah Alam)

*Diar Isda Yazmin (Deputy Public Prosecutor, Attoney General's Chambers) for the appellant.*
*Ramesh a/l KS Vasan (Ramesh Vasan & Co) for the respondent.*

**Apandi Ali JCA:**

## INTRODUCTION

**[1]** This is an appeal by the prosecution against the acquittal of the respondent after calling for his defence. Originally the respondent was jointly charged with another accused person, Mohd Sabri bin Abdul Ghani. The respondent was then the first accused person. The charge reads as follows:

> Bahawa kamu bersama-sama, pada 3 November 2003, lebih kurang jam 5.30 pagi, di rumah No. 209, Jalan 4, Taman Greenwood, di dalam daerah Gombak, di dalam Negeri Selangor Darul Ehsan, untuk mencapai niat bersama kamu, telah didapati mengedar dadah berbahaya iaitu seberat 113,616 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya 1952 dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

**[2]** At the end of the prosecution's case, the learned trial judge acquitted and discharged the second accused person but found that a prima facie case has been made out against the first accused, ie the respondent in this appeal. There was no appeal by the prosecution in respect of the acquittal of the second accused, Mohd Sabri bin Abdul Ghani.

**[3]** At the end of the trial, after hearing the defence, the respondent was acquitted and discharged. Not satisfied with that decision the public prosecutor appealed against the said acquittal.

**[4]** On appeal, this court allowed the appeal by the prosecution and set aside the order of acquittal and discharge by the High Court and found the respondent guilty and accordingly convicted and sentenced him to death for the offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. We now give the reasons for our decision.

## SALIENT FACTS OF THE CASE

**[5]** Acting on information received, the police was on a look-out for motorvan No KAQ 2351 at the R&R Hulu Bernam, along the North-South Highway, heading towards Kuala Lumpur. The police party consisted of three teams and were in three separate vehicles and each team was headed by officers, namely ASP Chang Song Tar, in an unmarked Proton Wira; C/Insp Mohamad Alpiyang ('SP6') in an unmarked Pajero and Insp Ahmad Nizam, in another

unmarked Proton Wira. They took their positions at the said R&R Hulu Bernam at about 1am on 3 November 2003. The police teams communicated with each other via walkie-talkies.

**[6]** At about 3am, ASP Chang saw the targeted vehicle, motorvan KAQ 2351 passing the R&R area. This was communicated to SP6, who then took the lead to tail the motorvan. The other two police teams followed from behind. SP6's Pajero tailed the motorvan until the toll plaza at Jalan Duta, Kuala Lumpur. Along the journey, the Pajero was driven abreast the motorvan for a couple of times and SP6, who was seated infront as a passenger of the Pajero was able to see the driver of the motorvan. The motorvan at all material time was driven with the driver's side of the window down. At the time of tailing the motorvan, SP6 observed that the motorvan was following a Kancil No KBJ 566, as if they were travelling as a convoy.

**[7]** Upon reaching the toll plaza at Jalan Duta, the police Pajero overtook the motorvan and stopped by the curb of the road. SP6 saw the Kancil and the motorvan also stopped by the curb of the road. The motorvan stopped at a distance of about three vehicles behind the Kancil and the Pajero ridden by SP6 was just ahead of the Kancil. Here, SP6 observed that the driver of the motorvan who was wearing a black t-shirt came out of the motorvan to talk to the driver of the Kancil. The driver of the motorvan then walked back to the motorvan. Then the passenger of motorvan who was wearing a red t-shirt came out from the motorvan and they exchanged places, whereby the one in the red t-shirt then took over the wheels of the motorvan. Both the Kancil and the motorvan moved towards Kuala Lumpur. SP6 and the other two police teams followed them.

**[8]** At the Segambut roundabout, the Kancil and the motorvan split directions and took different routes. The team led by ASP Chang followed the Kancil while the teams led by SP6 and Insp. Ahmad Nizam followed the motorvan. After going in circles in the Gombak areas, the motorvan finally stopped at a house No 209 Jalan 4, Taman Greenwood, Gombak.

**[9]** The team led by SP6 stopped about two houses away and the team of Insp Ahmad Nizam went into a lane behind the house. SP6 saw the man in black t-shirt getting out from the van and opened the gate to the house. The motorvan was driven into the compound of the house and the man in black t-shirt closed the gate and the man in red t-shirt came out from the motorvan and both of them entered the house. The lights at the porch of the house, at all material times, was lighted.

**[10]** After the driver and passenger of the motorvan entered the house, SP6 and his team moved in and parked in front of the house. SP6 and his team

climbed over the gate and broke into the house. Upon entering the house, the police found that the driver and passenger (the ones with the red t-shirt and the black t-shirt) of the motorvan were at the sitting room. SP6 identified the one with black t-shirt to be the respondent, Syed Ahmad Shariff and the one with red t-shirt to be Mohd Sabri. Two other persons, who are Indonesian nationals named Mohamad Irwan and Mawardi, were found in the kitchen area.

**[11]** The police party searched the house but nothing incriminating were found. SP6 then found the keys to the motorvan on the table at the sitting room. With the keys, the motorvan was unlocked and a brief search was made, but again nothing incriminating were found. However, SP6 was suspicious of the overhead air condition duct of the motorvan and it was decided that a thorough search of the motorvan will be made at the police station. The motorvan was then brought to the Balai Police Gombak where a thorough search was made. A screw driver was found on the door of the front passenger seat and SP6 used the said screw driver to open the air condition duct. The examination of the motorvan was done in the presence of the respondent and his friends. There were three separate compartments in the said air condition duct. Each compartment is covered with an iron door. SP6 recovered altogether 123 slabs of dried leaves suspected to be cannabis from the respective compartments.

**[12]** The 123 slabs were seized and a search list (exh P59) was issued and it was acknowledged by the respondent. Later the 123 slabs were sent to the chemist and the slabs were confirmed to be cannabis as defined under the Dangerous Drugs Act 1952, with a total weight of 113,616g. Subsequent investigations revealed that the motorvan KAQ 2351 was registered in the name of the respondent since 5 April 1997.

## DECISION BY THE HIGH COURT

**[13]** Having satisfied that these was a prima facie case against the respondent and after hearing the testimony of the respondent, the learned trial judge acquitted and discharged the respondent. The only reason given for such a decision, is on the issue of identification of the respondent. This can be seen in the last part of the grounds of judgment of the learned trial judge, which reads as follows:

> DAPATAN DAN KEPUTUSAN PADA AKHIR KESELURUHAN KES
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> 91. Setelah meneliti keseluruhan keterangan dari awal perbicaraan sehingga penutup keseluruhan kes, saya berpuashati bahawa terdapat keraguan yang munasabah tentang identiti lelaki yang dilihat oleh SP6 di dalam van KAQ 2351 itu pada malam dan pagi hari kejadian. Khususnya, terdapat keraguan munasabah sama tertuduh pertama ialah lelaki berbaju hitam yang dilihat oleh SP6 memandu van itu

semasa melepasi kawasan rehat Hulu Bernam sehingga Plaza Tol Jalan Duta dan kemudian menjadi penumpang van itu dari plaza tol itu sehinggalah van itu tiba di rumah tempat kejadian.

92. Oleh yang demikian, pertuduhan telah tidak dapat dibuktikan melampaui keraguan yang munasabah terhadap tertuduh pertama.

93. Maka, tertuduh pertama telah dilepaskan dan dibebaskan daripada pertuduhan.

CONTENTIONS BY THE LEARNED DEPUTY PUBLIC PROSECUTOR

**[14]** The learned deputy public prosecutor who appeared for the appellant submitted that there was no basis for the learned trial judge to change her findings on the identification of the respondent, at the end of the trial. It was also contended that the learned trial judge had erred in failing to consider all the evidence adduced at the trial, as mandated under s 182A of the Criminal Procedure Code. Corollary to the first argument, the learned deputy public prosecutor also submitted that the learned trial judge erred in failing to consider that the defence story was an afterthought.

OUR FINDINGS

**[15]** Looking at the submissions before us, we are of the considered view that besides the core issue of the identity of the respondent, in order to give maximum evaluation of the evidence adduced at the trial, we need also to touch on two other relevant issues, ie on the nexus between the drugs and the respondent and the proper approach in evaluating the defence story.

ON IDENTIFICATION

**[16]** It is our judgment that the identification of the respondent by SP6 is consistent with the Tumbull principle that emanated from the often-quoted case of *Raymond Tumbull & Ors* (1976) 63 Cr App R 132 at p 137, where the Court of Appeal held that:

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the

observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

**[17]** The quality of the identification by SP6 can be seen in his evidence (as can be found at pp 61–63, 65, 67 and 92–93 of the appeal records), which reads as follows:

Penglihatan saya tidak terhalang semasa saya lihat siapa yang berada di dalam van itu.

Cermin tingkap van itu tidak ditutup.

Cermin saya bertutup.

Kereta saya seiring beberapa kali.

Saya nampak pemandu van memakai baju t-shirt hitam telah keluar dari van dan pergi ke bahagian pemandu kereta Kancil yang berada di hadapan van dan bercakap sesuatu dengan pemandu itu lebih kurang 3-4 minit. Lalu kembali ke van.

Pada masa yang sama penumpang van itu keluar dari van. Saya nampak penumpang van itu memakai baju merah.

Yang baju hitam dan baju merah bertukar memandu. Lalu bergerak kembali, terus menghala ke Jalan Kuching.

Semasa melihat pemandu dan penumpang van bertukar tempat, tiada apa-apa menghalang penglihatan saya.

Masa yang saya nampak di tol Jalan Duta itu lebih kurang menghampiri jam 5 pagi. Saya ingat pukul 4 pagi.

Cahaya di tempat itu agak terang dari lampu tol dan lampu jalan. Lampu jalan menyala.

Saya berada di tol lebih kurang 5-8 minit.

Saya dapati lelaki berbaju merah dan berbaju hitam berada di ruang tamu.

Saya juga telah jumpa 2 lagi lelaki berada di ruang dapur rumah itu.

Saya mula-mula sampai di kawasan rumah itu lebih kurang pukul 05.20 pagi.

Sepanjang masa dari tol Jalan Duta sehingga saya lihat van itu parking di hadapan rumah itu, saya tidak ada melihat van itu berhenti di mana-mana. Kenderaan pasukan saya juga tidak ada berhenti di mana-mana.

Keadaan cahaya diterangi oleh lampu jalan dan lampu rumah semasa saya mula-mula lihat van itu parking di rumah itu.

Saya camkan lelaki berbaju merah dan berbaju hitam itu apabila berhenti. Selepas tol Jalan Duta, di mana lelaki berbaju hitam yang bercakap dengan pemandu kereta Kancil dan lelaki berbaju merah keluar dari bahagian tempat duduk penumpang van pergi ke bahagian pemandu.

Pada masa itu saya dapat lihat dengan jelas kedua-dua lelaki ini, raut wajah dan fizikal kedua-duanya dan adalah orang yang sama yang saya tangkap di dalam rumah itu.

Pakaian yang dipakai oleh mereka masih sama.

SP6: Tiang lampu terletak di bahagian tepi jalan dan terdapat spotlight dari plaza tol. Spotlight itu menyala ketika itu. Banyak tiang lampu di kawasan itu, cuma tidak berada betul-betul di sebelah kereta.

Di tol Jalan Duta, apabila van berhenti bersama dengan Perodua Kancil, saya turun dari kenderaan saya semasa pemandu van yang mula-mula itu bercakap dengan pemandu Kancil lebih kurang 3 minit.

Kawasan tol Jalan Duta itu walaupun jam 3.30 pagi adalah agak terang dengan limpahan cahaya lampu berhampiran dengan plaza tol dan saya mempunyai masa untuk melihat pertukaran pemandu di antara pemandu pada awalnya bertukar dengan penumpang di tempat itu.

Di Taman Greenwood, terdapat lampu di bahagian tempat parking kereta, car porch. Ada lampu.

Dalam gambar (P5) ini tiada tiang lampu tetapi ada tiang lampu berhampiran yang tiada di dalam gambar. Tiang lampu di situ lebih kurang 4-5 biji rumah ada satu tiang lampu.

Keadaan porch rumah itu agak terang. Lampu menyala.

Van masuk tempat parking, lepas itu pemandu keluar dari kenderaan dan menutup pintu pagar. Saya nampak.

**[18]** The identification features were also mentioned by SP6 in his contemporaneous police report (exh P64). Besides SP6, the investigating officer, SP7 also identified the respondent; as can be seen in his evidence (at p 99 of the appeal records) which reads as follows:

Saya boleh camkan 4 orang itu.

Ada di Mahkamah -

(1) Syed Ahmad Shariff yang memakai t-shirt purple.

(2) Mohd. Sabri yang memakai baju lengan pendek berpetak.

(Tertuduh (1) dan Tertuduh (2) dicamkan)

NEXUS BETWEEN THE DRUGS IN THE MOTORVAN AND THE RESPONDENT

**[19]** From evidence adduced as to how and when the 123 slabs of cannabis were found in the motorvan, it is clear that the said drugs were concealed in three specially constructed compartments on the ceiling of the vehicle and it was so-craftily designed to look like an air condition duct. All these can be seen in the evidence of SP6 as recorded at pp 68–69 of the appeal records. It is noted too that these was not a single cross-examination of SP6 on the discovery of the 123 slabs of cannabis in the specially constructed compartments in the air condition duct and ceiling of the motorvan. It was not challenged at all by the respondent. The cross-examination of SP6 can be seen from pp 87–92 of the appeal records.

**[20]** The investigating officer, SP7 described the special compartment where the drugs were found (see pp 100–101 of appeal records) as follows:

Hari pemeriksaan saya ke atas van, saya dapati van itu mempunyai sebuah special compartment di bahagian dalam bumbung van itu.

Special compartment itu dibuat seolah-olah nampak seperti sebuah ruang untuk pendingin udara.

Special compartment itu terdiri daripada tiga bahagian dengan keluasan tertentu, dan special compartment itu mempunyai sebuah ruang untuk tutup dan buka.

Bukaan itu boleh memuatkan satu ketulan ganja seberat satu kilogram.

Maksud saya ruangan di dalamnya besar dan satu ketulan boleh dimasukkan ke dalam ruang itu melalui bukaan itu.

Yang saya kata besar itu ialah ruangan keseluruhan.

Saya ada buat ukuran.

Special compartment itu terdiri daripada tiga bahagian. Dua bahagian di belakang, satu bahagian di belakang driver.

Bahagian belakang driver atas bumbung mempunyai pintu besi yang dibuat. Panjangnya 45 cm lebar, tinggi 8 cm, panjang 14 cm.

Bahagian di belakang ruang duduk penumpang pula, ada dua partition, ada dua ruang untuk dimasukkan barang di bumbung. Panjangnya dua partition itu 75 cm. Lebar 45 cm. Tingginya tidak diukur.

Bahagian belakang van itu pula tidak mempunyai tempat duduk penumpang.

**[21]** In relation to this, SP3, Shahrom bin Abdul Manan, the production manager from Cycle & Carriage Bintang Bhd, who deals in Mazda vehicles confirmed that the motorvan KAQ 2351 is a Mazda of which for that model the vehicle does not come with a factory fitted air-conditioner on the ceiling.

**[22]** From the above evidence, it is clear that there was no air conditioner in the said motorvan. It is also clear that the so-called air condition duct was just a dummy to conceal the special compartments therein. The covers to the duct were constructed in a deceptive manner. And since the motorvan was registered in the respondent's name since 5 April 1997, surely it is reasonable to infer that the respondent do have knowledge of the special compartments. It is our judgment too that the method and the way the 123 slabs of cannabis were concealed is corroborative evidence of knowledge on the part of the respondent (see *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415; and *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764).

EVALUATION OF THE DEFENCE STORY

**[23]** In essence the respondent admitted that he owned the motorvan KAQ 2351 but testified that a week before the incident and arrest, the motorvan was borrowed by his housemates, Irwan and Mawardi. According to the respondent, in the early morning of 3 November 2003, he was at home with another housemate, Mohd Sabri. The relevant part of his evidence (as at pp 116–117 of the appeal records) reads as follows:

Pada 03/11/2003, lebih kurang 4.30 pagi saya berada di rumah bersama dengan Mohd. Sabri.

Kemudian dalam pukul 5.30 pagi saya dengar van saya masuk.

Mawardi dan Mohd Irwan masuk ke dalam rumah.

Dia orang duduk di dapur. Saya berada di ruang tamu bersama dengan Mohd. Sabri.

Lebih kurang 10-15 minit kemudian, pintu saya dipecahkan.

Sebilangan lebih kurang 8 orang menyerbu masuk dengan bersenjata api dan *menangkap saya bersama Mohd Sabri.*

Baru dia orang mengenalkan diri sebagai Polis.

Sebilangan anggota ini menangkap Mawardi dan Mohd Irwan di dapur.

Saya bertanya kepada mereka 'kenapa tangkap kami?'

Mereka tidak beritahu apa-apa.

Sebilangan anggota menggeledah rumah.

Kemudian mereka bawa kami menaiki van, pergi ke Balai Polis Gombak.

Semasa mereka memasuki rumah, orang itu berpakaian biasa.

Anggota itu menggeledah rumah lebih kurang 1/2 jam.

Sampai di Balai Polis Gombak kami diarahkan berdiri di tepi van.

Seorang anggota polis memeriksa van dan salah seorang anggota polis telah membuka penutup aircon di bahagian atas, bahagian belakang. Lalu mereka mengeluarkan paket-paket.

Seorang anggota polis menanya saya, 'ganja itu adakah milik awak?'

Saya cakap 'tidak'.

Mereka memukul saya.

Mohd Sabri, Marwardi dan Irwan ada bersama saya semasa pemeriksaan dibuat.

Saya ditahan selepas pemeriksaan itu.

Yang tiga lagi itu pun sama. Ditahan.

Pada 03/11/2003 saya tidak ada gunakan van.

Mohd Irwan dan Mawardi telah meminjam van saya lebih kurang seminggu.

Mereka selalu pinjam van saya lebih kurang seminggu.

Mereka pinjam van saya untuk mengambil baju terpakai di Pulau Pinang, di Kelantan.

**[24]** During cross-examination however, the respondent agreed to the question posed by learned deputy public prosecutor that the police did not find any used clothings in the motorvan. This fact negated the story that the motorvan was used by Irwan and Mawardi to sell used clothings.

**[25]** It is also our finding that during the cross-examination of the prosecution witnesses, namely SP6 and SP7, there was not an iota of suggestion by the defence that the motorvan was driven by either Irwan or Mawardi as claimed by the respondent in his defence. It is trite law that if the defence version or story is not put at the earliest possible stage, such defence shall be deemed to be an afterthought and such non disclosure will have a negative effect on the credibility of the respondent's defence story. There are a plethora of case law on this: see —

(a) *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29;

(b) *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561;

(c) *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138;

(d) *Hamidon bin Mat Yatim v Public Prosecutor* [1995] MLJU 112; [1995] 3 CLJ 735;

(e) *Megat Halim bin Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 54 (CA); and

(f) *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236.

In fact, the Federal Court in the case of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733, even held that the trial judge, in such circumstances is entitled to disbelieve the accused person.

**[26]** In our appeal today, it seemed that the learned trial judge had failed to approach the evaluation of the defence story along the line as stated above. This, to our mind is a misdirection. Had the proper approach been undertaken and upon maximum evaluation of the whole evidence adduced at the trial, it is clear that the defence story was just a bare denial and an afterthought.

CONCLUSION

**[27]** It is our judgment that the defence story, in the light of the overall evidence, was in essence a bare denial and an afterthought, could not reasonably raise any reasonable doubt onto the prosecution's case. On this note, it is appropriate to quote what Sharma J said in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16:

> … A reasonable doubt must be doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence …

We are also mindful of what was said in *Miller v Minister of Pensions* [1947] 2 All ER 372 at p 373, which reads as follows:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

**[28]** For the above reasons, we unanimously allowed the appeal by the public prosecutor. The order of acquittal and discharge by the High Court is hereby set aside and in place we accordingly convicted the respondent for an offence

under s 39B(1)(a) of the Dangerous Drugs Act 1952 and accordingly sentenced him, to death, to be read, of course, with s 277 of the Criminal Procedure Code.

*Appeal allowed, decision of the High Court set aside, accused convicted on the charge and sentenced to death.*

Reported by Ashok Kumar